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No. 08-971

In The

Supreme Court of the United States

ROBERT SIMPSON RICCI, et al.,

Petitioners,

v.

DEVAL L. PATRICK, in his capacity as Governor of the Commonwealth of Massachusetts, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION BY RESPONDENTS MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS AND THE DISABILITY LAW CENTER

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Preliminary Statement

Respondents Massachusetts Association for Retarded Citizens and the Disability Law Center (together "MARC") have filed a brief in opposition to the Petition for Certiorari filed by Petitioners. One other Respondent (Appellee below) Wrentham Association for Retarded Citizens, Inc., has filed a brief in support of the petition. Another group of Respondents (Deval L. Patrick, Governor of the Commonwealth of Massachusetts, the Massachusetts Department of Mental Retardation, its Commissioner, Elin Howe, and Judyann Rigby, Secretary of the Executive Office of Health and Human Services of the Commonwealth of Massachusetts) have waived their right to file an opposition. [1]

In their Opposition to the petition, the MARC Respondents raise three issues: (1) they claim that, in their submissions to the First Circuit, Petitioners did not raise the issue of the proper standard of review to be applied to the district court decision; (2) they claim that there is no conflict among the Circuits on the

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[1] In addition, an amicus brief in support of the Petition was filed by the Voice of the Retarded, a national organization devoted to advocacy of equal rights for all retarded persons, regardless of their residence.

standard of review of a district court's interpretation of a consent decree, and (3) they claim that the District Court erred in requiring the Fernald Development Center to be kept open, contrary to the requirements of the Consent Decree in this case.

The MARC Respondents are incorrect in their assertion that the issue of the proper standard of review was never mentioned below. In addition, there is a very decided split in the Circuits on the deference to be given a district court's interpretation of a consent decree.

And finally the district court did not require that Fernald be kept open indefinitely, but merely that the guardians of the retarded persons may state a preference that they remain at Fernald as an option, which preference was not enforceable or mandatory upon the Department of Mental Retardation. That preference would be recognized when the DMR solicited choices for further residential placements, and it mandated that Fernald be part of the discussion in the ISP process for families that express such a preference.

I. The Issue of the Standard of Review to be Applied by the Court of Appeals to the District Court's Interpretation of a Consent Decree Was Raised Below.

The MARC Respondents are incorrect in asserting that Petitioners did not argue for a

deferential standard of review before the First Circuit.

On appeal, Petitioners argued that the finding of a "systemic failure" to provide services to mentally retarded persons justifiably triggered reassertion of the district court's jurisdiction. That finding was based upon the Court Monitor's factual analysis of the situation and the District Court's direct knowledge of the meaning of its own order. Its reassertion of jurisdiction was dependent upon, and therefore ancillary to, the entry of the DO. Thus Petitioners argued in their appeal brief:

> this [appeal] court must then decide whether the judge abused his discretion by concluding that it was appropriate to reopen the matter [citing *Jenkins v. Kansasy City Missouri School Dist.* 516 F.3d 1074 (8th Cir. 2008]. *Chesley v. Union Carbide Corp.*, 927 F.2d 60, 64 (2d Cir. 1991). *To the extent that the judge's conclusion rests on his factual findings, in order to show an abuse of discretion, the Commonwealth must demonstrate that those findings were clearly erroneous.*

Brief for the Plaintiffs-Appellees, First Circuit, Docket Nos. Nos. 07-2522 and 07-2523, at 22-23 (emphasis added)

The Wrentham Appellees made the same point in their brief to the First Circuit:

> A district court enjoys broad discretion to fashion equity decrees, and possesses the inherent power to enforce its own orders. . . . Where such orders are directed at implementing institutional reform, such as this case, circumstances demand that "judicially-imposed remedies [remain] open to adaptation . . . [and] improvement when a better understanding of the problem emerges." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969 (2d Cir. 1983)

The brief continued:

> Accordingly, appellate review of an order entered to enforce a prior decree is necessarily narrow, especially in institutional reform cases, and a trial court's decision to enter such an order is reviewable only for an abuse of discretion. *See Rufo [v. Inmates of Suffolk County Jail*, 502 U.S. [367] 393 [(1992)]] (O'Connor J., concurring) (describing abuse of discretion standard as applied to modification of institutional reform consent decree.)

Brief of Plaintiff-Appellee Wrentham Association for Retarded Citizens, Inc. First

Circuit, Docket Nos. 07-2522 and 07-2523, at 25-26.

Thus the issue of the standard of review of a district court's interpretation of a consent decree in institutional reform cases was certainly presented to the First Circuit.

As noted in the Petition, the DO provided that no transfers of patients would be allowed from one mental retardation facility to another unless the relevant state official "certifies that the individual to be transferred will receive equal or better services to meet their needs in the new location, and that all ISP-recommended services for the individual's current needs as identified in the ISP are available at the new location." (,DO, par. 4, App. 57). The DO also provided that:

> 7. a. If the defendants substantially fail to provide a state ISP process in compliance with this Order, or if there is a systemic failure to provide services to class members as described in this Order, the plaintiffs may seek enforcement of the Order pursuant to this paragraph. Individual ISP disputes shall be enforced solely through the state ISP process. (App. 59-60).

In 2003, the Commonwealth announced that it was planning to close the Fernald Development Center. Complaints were made that such a

move would constitute a "systemic failure" to provide necessary services and a proper ISP process. The district court then appointed the United States Attorney as a court monitor to make factual findings on that issue. After more than a year of "exhaustive and meticulous study" of all alternative facilities, the Court Monitor concluded in a March 6, 2007 report that "Fernald residents should be allowed to remain at the Fernald facility, since for some, many or most, any other place would not meet an 'equal or better' service outcome." (App. 37-38).

The District Court reviewed the report and the Monitor's conclusion that "for some Fernald residents, a transfer 'could have devastating effects that could unravel years of positive non-abusive behavior,'" (App. 39-40). The District Court concluded that "the Commonwealth's stated . . . judgment that Fernald should be closed had damaged the Commonwealth's ability to adequately assess the needs of the Fernald residents on an individual, as opposed to a wholesale basis." (footnote omitted)(App. 39).

Thus, based on the Court Monitors' finding, and its interpretation of its own disengagement order, the District Court found that the Commonwealth had engaged in a "'systemic failure' to provide a compliant ISP process," reasserted jurisdiction over the case

and issued a mandatory injunction to remedy this failure: (App. 40). He noted that:

> As this court oversaw entry of the Final Order, it is uniquely competent to declare that "systemic" simply was intended to have its plain dictionary meaning-"of or relating to a system." Webster's II New College Dictionary 1120 (2001). Accordingly,. a systemic failure need not be catastrophic in and of itself. Rather, it may simply be a problem of any magnitude, which manifests itself on a system-wide basis, across a number of ISP processes (App. 41).

The District Court's conclusion in this institutional reform case should be subject to deferential review, as five other Circuits have held, and as the First Circuit itself suggested in an earlier decision *See Navarro-Ayala v. Hernandez-Colon,* 951 F.2d 1325, 1337-38 (1st Cir.1991) (exception from *de novo* review for "public interest" consent decrees).

II. There Is a Split in the Circuits on the Issue of the Standard of Review to be Applied to a District Court's Interpretation of a Consent Decree That It Entered and Administered Over a Period of Time, Particularly in Institutional Reform Cases

Initially the MARC Respondents make the bizarre argument that the District Court was interpreting state law and not the words of the consent decree and such an interpretation of state law must be reviewed *de novo*. However, neither the district court nor the Court of Appeals thought they were interpreting any provision of state law. The parties agreed that an individualized process was required under the state ISP procedure. The entire discussion by the Court of Appeals focused on whether the specific terms of the DO were violated, namely the "systemic failure" language. The exact words or reach of the ISP process were simply not a factor in the lower courts' decision.

The MARC Respondents beg the question when it asserts that "Every Circuit Court Applies a De Novo Standard in Reviewing a District Court's Interpretation of the *Unambiguous* Provisions of a Consent Decree." But there is either a *de novo* standard or there is a deferential standard to be applied by an appeal court. By introducing the term "unambiguous" in its analysis, Respondents obscure the issue to be presented. If the consent decree is truly "unambiguous" then a court of appeals will reverse a contrary decision under either standard. But an appeal court must decide the standard of review before it decides whether any term of the consent decree is ambiguous or not.

In any event, Respondents are wrong in asserting that there is no split in the Circuits. The First Circuit itself agreed that such a split exists, see *F.A.C. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192. n. 4 (1st Cir. 2006), where the court noted the split in authority on the standard of review between the Third and Sixth Circuit. See also *Holland v. N.J. Department of Correction,* 246 F.3d 267, 277-78 (3d Cir. 2001) where the Court cited a series of cases that applied a deferential standard:

> Because of the hybrid contractual/court order status of a consent decree, there is some confusion in the courts (and disagreement among the parties) as to what standard of review we should apply here. NJDOC states that our review is simply plenary, [citing *United States v. Board of Education of Chicago*, 717 F.2d 378, 382 (7th Cir.1983) which seemed to apply both standards] . . .

The Court then noted the holdings of other Circuits that applied a deferential standard.

> *See, e.g., Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 371-72 (6th Cir.1998) (holding that "deferential de novo" is the proper standard of review for a district court's interpretation its a consent decree); *Goluba v. School Dist. of Ripon*, 45 F.3d 1035, 1037-38 & n. 5 (7th Cir.1995)

> (applying deferential de novo review to district court's interpretation of a consent decree, and noting further that abuse of discretion review is appropriate where "the judge oversaw the consent decree for an extended period of time and the decree is particularly complex or intricate"); *Officers for Justice v. Civil Serv. Comm'n*, 934 F.2d 1092, 1094 (9th Cir.1991) (applying deferential de novo review); *Berger v. Heckler*, 771 F.2d 1556, 1576 n. 32 (2d Cir.1985) (applying deferential de novo because "few persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it").

Legal commentators have also noted such a split. See Childress & Davis, *Federal Standards of review* § 2.23, at 2-141 (discussed in Amicus Brief of Voice of the Retarded at 8.)

Respondents totally misstate the holding of other courts. Thus they argue that the Ninth Circuit did not apply a deferential standard in *Nehmer v. Veterans Administration*, 284 F.3d 1158, (9th Cir. 2002), stating that the court simply looked at the plain language of the decree. But the Court in fact applied a deferential standard and concluded that the district court's decision was correct. The fact that a court agrees with the interpretation of

the lower court does not mean that no deference was given to the lower court decision.

Thus in *Huguley v. General Motors Corp.*, 999 F.2d 142, 146 (6th Cir. 1993), the Sixth Circuit relied upon "the well established principle that a district court's interpretation of its consent decrees is entitled to substantial deference on appeal. Such deference is required because, '[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it.' *Brown v. Neeb,* 644 F.2d 551, 558 n. 12 (6th Cir.1981)." Subsequently the court upheld the district court's interpretation. It stated: "as previously noted, Judge Feikens' interpretation of the scope of the consent decree is entitled to considerable deference on review." *Id.* at 148. It then noted: "The express language used and the district court's interpretation of the consent decree language, after full discussion and negotiation, lead us to that conclusion [reached by the district court.]" *Id.* Finally the Court of Appeals held: "We, accordingly, **AFFIRM** the decision and injunction of the district court. We find no *abuse of discretion* under the circumstances." *Id.* at 149. (emphasis added).

It is impossible to argue that the Sixth Circuit was not applying a deferential standard, indeed an abuse of discretion standard, under these circumstances.

III. The District Court's Order Did Not Contemplate Keeping Fernald Open Permanently.

As noted in our opening Petition, Judge Tauro's decision did not mandate that Fernald be kept open indefinitely. It simply required that the residents and their guardians be permitted to participate in the ISP process in the manner mandated in the 1993 Final Order. It allows the residents and their guardians to express a preference to remain at Fernald when the DMR solicits choices for further residential placements, and it mandates that Fernald be part of the discussion in the ISP process for families that express such a preference. That is, rather than simply ranking the choices offered by the DMR, the resident or guardian may, under Judge Tauro's order, express an opinion as to whether any proposed transfer would meet or fail to meet the equal or better standard and would provide all ISP mandated services for that resident. To the extent that the ISP process, prior to the August 2007 order, omitted Fernald as a choice in the placement discussion, that process effectively failed to consider whether the proposed transfer is or is not opposed by the resident or guardian. It also failed to provide an opportunity to consider whether any proposed alternative placement would meet the "equal or better" standard and would provide all ISP mandated services compared to Fernald.

Ultimately, the Court pointed out, the preference of a resident or guardian to remain at Fernald may not carry the day, and Judge Tauro made it clear that he was "simply ensuring that the DMR use the ISP process to adequately assess whether the setting is appropriate *and* whether it 'is not opposed by the affected individual.'" (App. 43). His order restored to the ISP process the right of the resident or guardian to be heard, it effectively provides the required constitutional safeguards, and it mandates that the DMR demonstrate that any alternative placement meets the "equal to or better" standard and that all ISP mandated services be provided. It does not give families absolute veto power over any proposed transfer or the ultimate closure of Fernald.

CONCLUSION

For the reasons stated above, this Court should grant the petition for certiorari.

Dated: New York, N.Y.
March 15, 2009

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